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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARNETT HELTON, JR., Defendant and Appellant.	A115489 (Alameda County Super. Ct. No. C150380)

A jury found defendant Arnett Helton guilty of first degree burglary (Pen. Code, § 459),[1] and guilty of attempting to murder Amber Evans (§§ 664, subd. (a), 187, subd. (a)). He was sentenced to 32 years to life in prison.

Helton makes six arguments on appeal: (1) the trial court responded improperly to the jury's request for a definition of "intent"; (2) the trial court erred by refusing to instruct the jury on trespass; (3) the trial court erred by instructing the jury with CALCRIM No. 372 regarding a defendant's flight; (4) defense counsel provided ineffective assistance by misleading the jury during his opening statement; (5) the cumulative prejudicial effect of these errors deprived Helton of his federal due process right to a fair trial; and (6) under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), the trial court's imposition of an upper term sentence on the attempted murder count violated Helton's federal constitutional rights. We conclude that the trial

[1] Unless otherwise noted, all statutory references are to the Penal Code.

court did not err in any of the respects asserted by Helton and further that his trial counsel did not provide him with ineffective assistance. Consequently, we affirm the judgment.

FACTUAL BACKGROUND

On February 22, 2005, at 1:30 a.m., Helton called Latrecia Bledsoe, the mother of his child, from his cell phone. Bledsoe hung up on him because she was tired. At 3:00 a.m., Helton called Bledsoe a second time and she again hung up on him. Before she hung up, Helton, who was adamant about talking, threatened to "do something if you don't talk to me." At 4:30 a.m. that morning, Helton called Bledsoe a third time. This time he said, "I told you if you didn't talk to me, I was going to do something."

Between 3:00 a.m. and 4:00 a.m. that morning, the victim, Amber Evans, was asleep in her apartment with her toddler son beside her. She was more than seven months pregnant. A strange noise awoke her, which sounded like the blinds in her kitchen. A short while later, she saw a person standing in the doorway to her bedroom. The person wore all black clothes, including black gloves and a black, hooded sweatshirt. She could not see the person's face; only a nose was visible because the drawstrings to the hood were pulled tightly.

Evans said to the person, "Please don't kill me. I have a baby." The person immediately lunged for Evans's throat and began strangling her while she was still in her bed. Evans lost consciousness about 30 seconds later. When Evans regained consciousness, she was lying on her back on the floor next to her bed. Her son was crying loudly from the bed. Her attacker, who was hovering over her, quickly fled.

Evans reached for the phone next to her bed to call the police and discovered that its cord had been torn. She grabbed her son and ran around the corner to the home of her friend, Yovonda Hewitt. Evans arrived at Hewitt's home crying, and said, "Please call the police, because someone just broke into my home and tried to kill me." After 911 was called, Evans told the dispatcher that someone had just broken into her home and choked her. When the dispatcher asked Evans whether her attacker was male or female, Evans said she could not tell because of the hood covering the attacker's face. She

testified at trial that she could not identify Helton as her attacker, but stated that his height and weight were consistent with that of the attacker.

An ambulance transported Evans to the hospital, where she was examined and released that afternoon. While at the hospital, she experienced difficulty swallowing. She had scratches on her face, and her eyes were black and bloodshot.

Helton's fiancée, April Jones, lived with Hewitt. About 15 minutes after Evans arrived at Hewitt's house, Jones called Helton at his mother's home, which was nearby. No one answered, so she left a message for him there. Helton returned Jones's call about five minutes later, and Jones told him that someone had tried to kill Evans.

After the ambulance took Evans away, Helton arrived at Hewitt's home. He was wearing dark clothing, and holding a dark, hooded sweatshirt with drawstrings. Helton appeared upset and nervous, and mentioned that he had lost his cell phone.

After leaving Hewitt's home, Helton called Jones several times and asked whether she had found out anything else about what had happened to Evans. Helton also called Bledsoe about 9:30 a.m. and told her that he had done "something stupid," but would not reveal what he had done. Helton asked Bledsoe to tell his kids that he loved them, and told her that he was "on the run."

Around the same time, Helton went to the house of some friends. There, he appeared to be nervous and jittery, and said that he had done "something stupid." Helton said that he believed that Jones was going to Evans's home to cheat on him. Helton told one of his friends that he had broken into Evans's house and had almost killed her by strangling her. Helton said that if Evans's child had not woken up, he would have killed Evans. Helton also said that he had accidentally dropped his phone during the incident, while he was on his way out of Evans's house through the window.

When the police arrived at Evans's apartment, the bedroom appeared to have been ransacked. The bed's top mattress had been pushed off the bed frame. Various items were strewn over the floor, including hair braids consistent with Evans's hair and a baby cap which subsequent DNA analysis showed had Evans's blood on it. Also, the telephone cord in the bedroom had been pulled from the wall or cut. In the kitchen, the

window was open, and the mini-blinds were protruding outward. Outside, underneath the kitchen window, there was a recycling bin with a bucket stacked on top of it.

In the backyard of the apartment, the officers found a cell phone which had "April's man" as its screen saver, as well as a black knit cap. Jones identified the cell phone as belonging to Helton. DNA analysis of the cap showed DNA from more than one donor, but that the major donor was Helton.

The cell phone led the investigating police officers first to Helton's fiancée, Jones, and then to Helton's mother's apartment. When Helton saw the police arrive at his mother's apartment, he started running. The police gave chase and succeeded in taking him into custody.[2]

At the police station, Helton waived his *Miranda*[3] rights and was interviewed by Sergeant George Phillips. During the interview, Helton said that he had been angry about Jones taking men to Evans's apartment, which he said he had observed Jones do in the past. Helton said that on the morning of the incident he set up objects to climb into Evans's apartment and that at the time he believed that Jones was inside the apartment with another man. He told Phillips that when he opened the window to the apartment, "things got fuzzy" and he passed out. Helton remembered later struggling with someone inside the bedroom until he heard a baby cry. He then ran, got to the kitchen window, and blacked out again. He said he dropped his cell phone during the incident. Helton added that he did not mean to hurt Evans, and that he had nothing against her, and instead had problems with Jones.

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[2] We discuss the circumstances of Helton's arrest in greater detail in section III. *post*.

[3] *Arizona v. Miranda* (1966) 384 U.S. 436.

DISCUSSION

I. Response to the Jury's Request for a Definition of "Intent"

a. Procedural Background

Near the end of the second day of its deliberations, the jury sent a note to the trial court: "We the jury would like the judge to define the legal definition of 'intent' as mentioned in part 2 of count 2 regarding attempted murder." The court had earlier instructed the jury regarding attempted murder as follows: "The defendant is charged in count two with attempted murder. [¶] To prove that the defendant is guilty of attempted murder, the People must prove the following . . . two elements: [¶] One, that the defendant took a direct but ineffective step toward killing another person; [¶] and two, that he intended to kill that person." (See CALCRIM No. 600 [attempted murder].)

The court and counsel conferred in chambers about the note. Then, with both counsel present, the court told the jury: "I got your note, and I brought you down here . . . because I need some clarification about the request . . . . When I'm answering questions about the law, I want to be as precise as possible. [¶] Your request has left me with some questions. I'm not sure exactly what I need to be precise about, so I need to clarify what you're looking for here, then formulate a response for you. My game plan is this: given the time of day [4:22 p.m.], I figured I would bring you down, find out exactly what it is that you're looking for in this request, then I'm going to send you home for the night, and I'll have your answer for you in the morning. This gives me an opportunity to allow the attorneys to digest what we talk about here, and then provide me with whatever input they want to provide me with."

The trial court then discussed the jury's note with the jury foreperson. The court first confirmed that the note referred to the second element in the attempted murder instruction (CALCRIM No. 600), "that the defendant intended to kill that person. Am I correct?" The foreperson agreed that was correct. The court then asked the foreperson whether there was "something specific that you have in mind that you're looking for me to clear up about that particular element? . . . [¶] I break it down into two parts . . . . [¶] The first part is, the defendant intended to kill. The second part of the sentence is that

person. . . . [D]oes the question relate to one of those two parts of the sentence . . . ? " The foreperson responded that "it focuses purely on the intention part [¶] regardless of that person." The court then asked whether "this focus on the intention part[has] anything to do with the instruction I gave a little later, where I said that every crime requires proof of the union or joint operation of act, the act that's committed, and the wrongful intent. They have to occur at the same time . . . Does the confusion . . . relate to that instruction at all?" The foreperson responded, "Possibly."

The foreperson then explained that "in the jury's mind, there's a big difference between the idea of intending to kill somebody versus purposely wanting to kill somebody. [¶] . . . [¶] . . . So, in other words, by committing this act, do I intend to kill that person, or do I intend to inflict harm to that person?" The court then asked whether the jury's question was whether it is "enough to simply intend to harm somebody?" The foreperson responded that he did not think that was the question, and asked the court whether there is "a legal definition of intent?"

The court explained: "The element says that it's required to be proved that the defendant intended to kill that person, so you're asking, when I instructed the defendant intended, is there a further definition of that word 'intended' that would be helpful to you? Is that what you're asking a legal definition of what I mean by 'intended'?" The foreperson responded by saying, "So if I do this, do I know that I intend to kill this person versus if I do this, I have no idea if it really will kill him or not?" The court then asked, "Are you trying to make the distinction between whether somebody wants to achieve a certain result versus whether they know if they do this, it will achieve a certain result?" The foreperson agreed that this was what the jury was looking for.

The court then said, "In other words, the difference between wanting it to happen and knowing it's going to happen. When you asked me about wanting before, versus intending, is that the distinction you were trying to make, or have I now confused you?" The foreperson did not respond.

The court then wrapped up the discussion as follows: "Maybe now that we've kind of gone back and forth with this a little bit, how about if we do this: let's just knock

off for the day. We're coming back tomorrow anyway. You want to sit down and give it another shot, try to articulate what the issue is? I think that I have a sense of what the issue is, and apparently, I said it right . . . a moment ago. Everybody seemed to agree with what I said. The difference between doing something . . . for the purpose of achieving a certain result versus doing something knowing that a certain result is going to be accomplished."

But when the court again asked whether that was "the distinction" the jury was making, the court observed that it "[a]pparently" was "not."[4] The court then acknowledged that it and the jury were "kind of missing each other," and that the court was "having some trouble trying to figure out exactly what you're looking for. [¶] The answer is, to the one question, there isn't a legal definition for the word 'intended,' so you use that term the way you commonly use that term. But I think . . . I'm going to ask you to come back tomorrow morning, sit down and figure out a different way to ask this that I can try to address, because I want to help you. I want to answer your question. I just need to know exactly what the question is. If I think it's this question, but it's really this question, and if I give you an answer to this one, it might be misleading you on this one. It could confuse you on this question, and that's what I want to try to avoid. . . . [¶] . . . I just want you to explain where the confusion is. I'll let it go at that. I'll let you folks figure it out. I want to answer your question. You just need to give me a question that I can answer." The court concluded by saying that "basically" what it was saying was, "Give me another note in the morning. [¶]. . . [¶] Sit down, retool this note, and let's give it another shot, and let's see if you can give me something on what . . . the question is really about, or the issue or confusion, if there is a confusion, and I'll do my best to answer it for you. So go home, have a safe trip, a nice evening, . . . sleep on it,

[4] We cannot tell from the transcript whether the court's assessment that it had "apparently" not gotten the distinction correct was based on some reaction by the jury or on something said by the foreperson which was not transcribed.

come back in the morning, and starting at 9:30 a.m. we'll be down here, anxiously awaiting your next note to see how I can help you."

The jury returned the next morning to resume its deliberations, but did not submit any more questions to the court. At 2:10 p.m. that afternoon, the jury returned its verdicts, finding Helton guilty of first-degree burglary by entering an inhabited dwelling house or building occupied by Evans with the intent to commit felony assault or murder, and finding him guilty of attempting to murder Evans. However, the jury did not find that the attempted murder was committed willfully, deliberately, and with premeditation.

b. Analysis

Defendant argues the trial court's response to the jury's request was inadequate and misleading, thereby violating his rights to due process and a fair trial. We conclude that defendant has forfeited this asserted error, and in any event that the trial court's response was proper.

As indicated by the record quoted at length above, defense counsel remained mute on this issue before, during, and after the trial court's colloquy with the jury's foreperson. "A defendant may forfeit an objection to the court's response to a jury inquiry through counsel's consent, or invitation or tacit approval of, that response." (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1048.) " 'Tacit approval' of the court's response, or lack of response, may be found where the court makes clear its intended response and defense counsel, with ample opportunity to object, fails to do so. [Citation.] At its furthest reach the rule has been held to justify a forfeiture where defense counsel sat mute while the court provided a response later challenged on appeal. [Citation.] . . . [¶] Waiver has also been found where the court responds to an inquiry with a correct and germane statement of the law, and the defense counsel proposes no further clarification." (*Id*. at pp. 1048-1049; see also *People v. Anderson* (1966) 64 Cal.2d 633, 639 [concluding that the defendant had forfeited the argument that the trial court erred in failing to amplify or explain the instructions given where defense counsel did not challenge at trial the content of the instructions given or request any additional amplification or explanation];

People v. Roldan (2005) 35 Cal.4th 646, 729 ["When a trial court decides to respond to a jury's note, counsel's silence waives any objection under section 1138"].)

After the court received the jury's note, it conferred with both counsel. The court then spoke with the foreperson at length with both counsel present. The jury returned the following morning to continue its deliberations. Defense counsel had ample opportunities to put an objection on the record, or to request or propose further clarification, but failed to do so.[5] Perhaps this was understandable, as the court's response defining "intended" was "a correct and germane statement of the law." (*People v. Ross*, *supra*, 155 Cal.App.4th at p. 1049.)

Thus, even assuming Helton has not forfeited this issue on appeal, we conclude that the trial court acted properly.

We apply "the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury." (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746 (*Waidla*).) We review the adequacy of the court's instruction regarding the definition of "intended" de novo. (See *People v. Guiuan* (1998) 18 Cal.4th 558, 569-570; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1424.) In considering whether error occurred, we determine whether there is a "reasonable likelihood" that the jury applied the court's instruction as Helton asserts the jury did. (*People v. Kelly* (1992) 1 Cal.4th 495, 525.) " 'In addressing this question, we consider the specific language under challenge and, if necessary, the charge in its entirety. [Citation.] Finally, we determine whether the instruction, so understood, states the applicable law correctly.' " (*Id.* at p. 525.)

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[5] Helton asserts that the trial court's "extensive colloquy with the jury" occurred "without consulting counsel." The record is otherwise: the clerk's transcript states that counsel was notified about the jury's note at 3:55 p.m.; that at 3:58 p.m., "Court and counsel confer[red] in chambers regarding the latest Request by Jury"; and that at 4:22 p.m., with both counsel present, the court "address[ed] the jury foreman regarding their last request."

A court's obligation to respond to jury questions during deliberation is governed by section 1138, which states in relevant part: "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, . . . the information required must be given . . . ." (§ 1138.) According to our Supreme Court, this language "imposes on the court the 'primary duty to help the jury understand the legal principles it is asked to apply.' " (*People v. Cleveland* (2004) 32 Cal.4th 704, 755.) "Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] . . . The trial court . . . must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) The trial court " 'has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." ' " (*People v. Mobley* (1999) 72 Cal.App.4th 761, 781.)

Helton concedes that "the trial judge here had but the best of intentions when he engaged the jury in a discussion regarding their confusion over the 'intent' element." But, he argues, that the court failed to clear up their confusion and ultimately inhibited "the jury from seeking further communications on the issue." Not so. The record is clear that the trial court not only directly and correctly answered the question posed in the jury's note, but also explicitly and repeatedly encouraged the jury to submit another note clarifying its question. In so doing, the court more than fulfilled its duties.

When the court orally answered the note's question by saying that "intended" had no "legal definition" and that the jury should use that term in the way it is commonly used, the court fulfilled its duty to define a term about which the jury had indicated confusion. (See *People v. Miller* (1981) 120 Cal.App.3d 233, 236 ["where the jury during its deliberations indicates confusion over the meaning of [a] term and specifically requests a definition of the term, . . . the court must honor the request"].) It was within

the court's sound discretion to provide this limited instruction in response to the note. (See *Waidla, supra*, 22 Cal.4th at pp. 745-746; see also *People v. Anderson, supra*, 64 Cal.2d. at p. 639 ["when terms have no technical meaning peculiar to the law, but are commonly understood by those familiar with the English language, instructions as to their meaning are not required"].)

Helton does not argue that the term "intended" as used in the attempted murder instruction here had a meaning different from its common usage. Instead, Helton relies on statements made by the jury's foreperson to argue that "the jury was essentially trying to determine whether implied malice could support a charge of attempted murder." The record does not support Helton's assertion. First, the jury's note did not ask about implied malice and the jury never submitted any written request asking about implied malice. Second, the court specifically raised the issue of implied malice with the jury and invited it to submit a written question about the issue. For example, the court asked the jury whether it wanted to know the "difference between doing something . . . for the purpose of achieving a certain result versus doing something knowing that a certain result is going to be accomplished." However, the jury indicated this was not its source of confusion.

Helton argues that by failing to instruct the jury on the distinction between express and implied malice, "the trial judge left a potentially erroneous impression in the minds of the jurors." We disagree, and conclude that the trial court properly exercised its discretion to limit its response in the way it did. Indeed, instructing on express versus implied malice when the jury indicated it was not confused about this issue and never submitted a written question raising it, would have been risky. It could have confused the jury, or worse, left them with the incorrect impression that implied malice was relevant. "Nothing less than a specific intent to kill must be found before a defendant can be convicted of attempt to commit murder, and the instructions in this respect should be lean and unequivocal in explaining to the jury that only a specific intent to kill will do." (*People v. Santascoy* (1984) 153 Cal.App.3d 909, 918.) As Helton concedes, there should "never be any reference whatsoever to implied malice" in instructing the jury on

the crime of attempted murder. (*Ibid.*) Here, the instruction on attempted murder was full and complete (*People v. Beardslee, supra,* 53 Cal.3d at p. 97), and made it clear that the defendant must harbor an actual, specific intent to kill the victim.[6]

Helton has also failed to meet his burden of showing a "reasonable likelihood" that the jury applied the court's response to its question in an unconstitutional manner. (See *Weeks v. Angelone* (2000) 528 U.S. 225, 236; see also *People v. Owens* (1994) 27 Cal.App.4th 1155, 1159 ["an erroneous instruction requires reversal only when it appears that the error was likely to have misled the jury"]; *People v. Hernandez* (2003) 111 Cal.App.4th 582, 589 [" 'If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction"].) As discussed above, nothing the court said to the jury was improper. If the exchange between the court and the foreperson had any impact on the jury, it was to make it easier for the jury to submit another note because the court framed several possible questions and made insightful, thought-provoking inquiries. However, despite the court's repeated urging, the jury did not submit any further notes. (See *Weeks v. Angelone, supra,* 528 U.S. at p. 234 [trial court's response to jury's question which was limited to directing the jury to a portion of an instruction already given was proper where the "jury did not inform the court that after reading the relevant paragraph of the instruction, it still did not understand its role"].)

II. Refusal to Instruct on Trespass

Helton next argues that the trial court erred in refusing defense counsel's request for an instruction on simple trespass as a lesser included offense to the burglary count, thereby violating his Sixth Amendment and due process rights. We review de novo the trial court's decision not to instruct on trespass (*Waidla, supra,* 22 Cal.4th at p. 733) and conclude there was no duty to instruct on trespass in this case.

[6] Besides clearly stating that the second element of the crime is an intent to kill the victim, the instruction explains with respect to the first element that a "direct step indicates a definite and unambiguous intent to kill." (See CALCRIM No. 600.)

As a preliminary matter, we reject the Attorney General's argument that Helton's claim may not be considered on appeal because Helton did not object *on constitutional grounds* to the trial court's refusal to give a trespass instruction. Without specifically mentioning Helton's constitutional rights, defense counsel requested a trespass instruction on the ground that the jury could find an entry by Helton, but then not find the requisite specific intent for burglary. This, we conclude, adequately preserved this issue for appeal. In requesting this instruction as a lesser necessarily included offense and setting forth the factual basis for the instruction, the constitutional implications of failing to give the instruction were implied. (See *People v. Partida* (2005) 37 Cal.4th 428, 435-436; *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)[7]

Helton argues that in this case trespass was a necessarily included offense under the "accusatory pleading test."[8] The "accusatory pleading test" is satisfied " ' "if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." ' " (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.) But, strictly speaking, the allegations of the accusatory pleading in this case do not necessarily include criminal trespass. The burglary count essentially tracks the language of the burglary statute (§ 459), and simply alleges that Helton entered an inhabited dwelling house "with the intent to commit larceny and any felony." The burglary count says nothing about entering the dwelling without permission, a necessary element of trespass. (See § 602.5,

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[7] Indeed, even had defense counsel not requested the instruction, a trial court must instruct the jury sua sponte on a lesser necessarily included offense when there is substantial evidence in support. (*Waidla, supra*, 22 Cal.4th at p. 733; *People v. Breverman* (1998) 19 Cal.4th 142, 162-163 (*Breverman*).)

[8] Helton acknowledges that simple trespass is not a lesser necessarily included offense of burglary under the "elements test." (See also *People v. Birks* (1998) 19 Cal.4th 108, 118, fn. 8 ["It appears well settled that trespass is not a lesser necessarily included offense of burglary, because burglary, the entry of specified places with intent to steal or commit a felony (§ 459), can be perpetrated without committing any form of criminal trespass (see § 602)"]; *People v. Sakarias* (2000) 22 Cal.4th 596, 622, fn. 4 [burglary, by its statutory definition, does not "necessarily include" trespass].)

subd. (b) [unauthorized entry of dwelling]; see also CALCRIM No. 2932 [elements of trespass are (1) willful entry of the dwelling and (2) entering or remaining in the dwelling without consent].) Indeed, in the context of an almost identically worded burglary count, our Supreme Court stated, albeit in dicta, that the accusatory pleading test had not been satisfied. (*People v. Birks, supra,* 19 Cal.4th at p. 118, fn. 8 [the information there alleged "that defendant 'did willfully and unlawfully enter . . . a commercial building . . . with intent to commit larceny and any felony' "]; but see *People v. Gauze* (1975) 15 Cal.3d 709, 714 [in concluding "that defendant cannot be guilty of burglarizing his own home," stating that a burglary "still must be committed by a person who has no right to be in the building"].)

But, even if trespass were a necessarily lesser included offense here based on either the allegations in the information or the relevant statutes, there was not substantial evidence to support a trespass instruction in this case. When a defendant requests an instruction on a lesser necessarily included offense, the court must give the instruction only if there is substantial evidence to support conviction of the lesser offense. (See *People v. Flannel* (1979) 25 Cal.3d 668, 683-684 & fn. 11; see also *People v. Kaurish* (1990) 52 Cal.3d 648, 696 [" '[D]ue process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction' "]; *Breverman, supra,* 19 Cal.4th at p. 162 ["the court is not obliged to instruct on theories that" are not supported by "substantial evidence"].) Substantial evidence in this context means "evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." (*People v. Blair* (2005) 36 Cal.4th 686, 744-745.) Evidence which is "minimal and insubstantial" does not trigger the duty to instruct. (*Flannel, supra,* 25 Cal.3d at p. 684.)

Helton asserts that there was substantial evidence that he lacked the requisite felonious intent for burglary when he allegedly entered Evans's apartment. He relies on evidence that he was under the influence of intoxicating drugs that night, that he had no personal animosity toward the victim, and that he believed that his fiancée had been with other men in Evans's apartment. According to Helton, the jury could have interpreted

this evidence to mean that he "entered the apartment without permission, but not necessarily with an intent to harm Amber Evans."

But even if a reasonable jury were to believe all this evidence, a reasonable jury would not simultaneously absolve him of burglary and convict him of trespass. The obligation to instruct on lesser included offenses is triggered only when "there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater, but not the lesser." (*Blair, supra,* 36 Cal.4th at p. 745.) The problem is that if the jury accepted the evidence highlighted by Helton and also the evidence establishing a trespass—that Helton entered and remained in the apartment without Evans's permission (§ 602.5)—then there was no substantial evidence of a lack of intent to harm someone inside that apartment.[9] In other words, the same evidence establishing a trespass, if accepted by the jury, also establishes the requisite intent for burglary.

The evidence establishing entry without permission consisted of evidence that during the wee hours of the morning the perpetrator entered the kitchen window, after propping things up to reach the window, and while wearing an all-black outfit which was obviously intended to conceal his identity. When Evans saw the perpetrator, she asked him not to kill her, but he nevertheless lunged for her throat. No reasonable jury could conclude from this evidence that the perpetrator entered the apartment without an intent to commit a felony. And there was no evidence to establish an intent to steal or to commit any felony other than one involving an attack on someone in the apartment. The only thing that happened inside the apartment was the attack on Evans.[10] (See *People v. Sakarias, supra,* 22 Cal.4th 596, 621-622 [where there was no substantial evidence

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[9] The burglary instructions given to the jury provide that it must find Helton "intended to commit either assault with force likely to produce great bodily injury or murder." The instructions further state that the jury need not agree "on which of those crimes he intended."

[10] Contrary to what Helton asserts, defense counsel did not specifically argue that there was reasonable doubt that Helton "either had the ability to specifically form a felonious intent or had such an intent at the time he entered the apartment." Instead, defense counsel argued that Helton was not the perpetrator.

defendant entered the house without a felonious intent, the trial court did not err in failing to instruct on trespass as a lesser necessarily included offense of the burglary count].)

People v. Hulderman (1976) 64 Cal.App.3d 375, one of the cases Helton relies on, illustrates this point—that often, true in this case, the evidence which supports the inference that the defendant entered the dwelling with an intent to commit a felony for purposes of burglary also establishes—and is inseparable from—the evidence which supports the inference that the defendant entered without consent for purposes of trespass. As the court in *Hulderman* explained, "[e]vidence establishing a defendant entered a dwelling with the intent to commit larceny supports an inference he entered without consent. Ordinarily the occupant of a dwelling does not consent to its entry by another for the purpose of committing larceny therein. In the case at bench the evidence establishes defendant entered the trailer coach with intent to commit larceny and supports the inference he entered without consent. Other than the inference thus raised there is no evidence defendant entered the trailer without the consent of the owner, his agent or the occupant. *In the event the jury did not accept the evidence establishing defendant's entry was with intent to commit larceny as proof of his intent, there is no evidence he was in the trailer without consent.* Thus, under the evidence the defendant was guilty of burglary as charged or was not guilty of any offense. Under these circumstances, the failure to give an instruction on the alleged lesser-included offense of unlawful entry was not error [citation]." (*Id.* at p. 379, italics added.) Similarly here, if the jury had rejected the evidence establishing that Helton entered the apartment with an intent to harm its occupant, then there would not have been any remaining evidence to establish that he even entered Evans's apartment that night, let alone entered it without her permission.

For similar reasons, we conclude that there is no reasonable probability that the outcome of the trial would have been more favorable to Helton had the jury been instructed on trespass as a lesser included offense of burglary. (See *Breverman, supra,* 19 Cal.4th at p. 165 [the failure to instruct on a lesser included offense is subject to reversal only if "an examination of the entire record establishes a reasonable probability that the error affected the outcome"].) In addition to the evidence discussed above, there

was overwhelming evidence that Helton committed a burglary. This additional evidence included the aftermath the intruder left in Evans's apartment, as well as Helton's admissions to police and friends about breaking into the apartment that night, about his anger toward his fiancée as his motive, and about strangling Evans until her toddler awoke.

III. Flight Instruction: CALCRIM No. 372

a. Factual Background

On the day of the incident, Evans met with Sergeant Phillips. Evans was aware that "April's man" was the screen saver on the cell phone that the police found in her backyard, and she told Phillips that "April" was Helton's fiancée, April Jones, and put Phillips in touch with Jones. During his conversation with Jones, Phillips determined that Helton was a suspect in the crimes. After getting the address for Helton's mother from Jones, Phillips and some fellow officers went to the mother's apartment at around 3:00 p.m. that afternoon.

While Phillips and one of the officers were on their way to knock on the apartment's front door, another officer approached the back of the apartment. There, he saw Helton walking toward the back door of the building. The officer told Helton twice that he wanted to speak with him. Helton continued to walk into the apartment building. As Philips and the other officer approached the front of Helton's apartment, Helton ran out the front door, shoved one of the officers aside, and ran down the street at a full sprint. Phillips yelled, "Stop[!] Police[!] Stop[!]" The officers chased Helton as he ran down the street until Phillips was able to stop him and take him into custody.

b. Procedural Background

At the People's request and over defense counsel's objection, the jury was instructed with CALCRIM No. 372 as follows: "If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of

that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself." (See CALCRIM No. 372.)

Before the court gave this instruction, defense counsel argued that it was prejudicial and not supported by the evidence because Helton was arrested about 12 hours after the incident, was arrested at his own home, and had not yet been accused of a crime. The court responded that the instruction was not prejudicial, but that the evidence was prejudicial, "just as any evidence which would tend to your client's guilt is prejudicial. I think that the evidence . . . regarding Mr. Helton running from the police is certainly relevant on his state of mind. And . . . there's a basis upon which the jury could conclude that it's evidence of his consciousness of guilt. They might not. But since . . . the evidence is there, it's relevant on that question, it seems appropriate to me to give an instruction on flight . . . ."

The court acknowledged that it had considered "whether to modify the wording of the instruction, since it refers to flight . . . immediately after a crime has been committed, or after the defendant has been accused of a crime. Well, as we clearly know, he hadn't been accused of a crime. [The] police hadn't even had a chance to talk to him, much less accuse him of anything, so that doesn't seem to literally fit. And it's not immediately after the commission of a crime, because we're talking about 12 hours later, roughly—[¶] . . . [¶] as you pointed out. So I was sort of on the horns of dilemma. Do I give the instructions as worded in CALCRIM, or do you start modifying it to adapt to . . . the evidence here?"

The court explained that it decided it should "give an instruction on flight" and that "tinkering with the language to tailor it to the facts would be a little dangerous in that it might come across as instructing the jury that it is the specific conduct, that specific circumstance is evidence of consciousness of guilt." So the court decided it would be best to leave the instruction unaltered, allowing "the jury [to] decide whether it was for these purposes, sufficiently close to the commission of the crime, or whether the officer's conduct in approaching the house could be interpreted by Mr. Helton as some sort of accusation. Tacit accusation." The court concluded that it was better to give the jury

CALCRIM No. 372 unmodified, which the court characterized as "a simple statement of the law," and to let the jury "draw their [own] conclusions about the facts . . . ."

During his closing arguments, the prosecutor emphasized that Helton had run from the police when they went to talk with him at his home. The prosecutor urged the jury to view this behavior as "consciousness of guilt" per the flight instruction because there was no evidence to suggest that Helton fled from the police for any other reason that the fact that he knew he was guilty. Defense counsel argued that when Helton ran from the police, he did so not because of consciousness of guilt but because he was in an area of Oakland with poor police relations.

c. Analysis

Helton argues that it was error to give the flight instruction because Helton's flight was neither immediately after the crime nor in response to an accusation that he committed the crime. We conclude that the evidence supported giving the instruction unmodified.

As a preliminary matter and for the same reasons discussed in the context of the trial court's refusal to instruct on trespass, we reject the Attorney General's argument that Helton's claim may not be considered on appeal because Helton did not object *on constitutional grounds* to the flight instruction. Defense counsel adequately preserved the issue by arguing that there was an insufficient factual basis for the instruction. The constitutional implications of giving the instruction were implied in his objection. (See *People v. Partida*, *supra*, 37 Cal.4th at pp. 435-436; *People v. Yeoman, supra,* 31 Cal.4th at pp. 117-118.)

The flight instruction the trial court gave here, CALCRIM No. 372, is based on section 1127c, which provides that "[i]n any criminal trial . . . where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his

guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine." (§ 1127c.)

On appeal, we review the propriety of giving the flight instruction de novo. (*People v. Russell, supra,* 144 Cal.App.4th at p. 1424.) We must determine "whether sufficient evidence was presented by the People from which the jury could have reasonably inferred that defendant fled after the commission of the crime." (*People v. Lutz* (1980) 109 Cal.App.3d 489, 498.) If sufficient evidence was presented, then the "issue as to whether a defendant's conduct constitutes a flight within the meaning of the instruction is a question of fact to be determined by the jury." (*Id.* at p. 499.) Our Supreme Court has held that a "flight instruction is proper whenever evidence of the circumstances of defendant's departure from the crime scene or his usual environs . . . logically permits an inference that his movement was motivated by guilty knowledge." (*People v. Turner* (1990) 50 Cal.3d 668, 694.) Indeed in these circumstances, and where the prosecution relies on such evidence to show consciousness of guilt, the court has a duty to give a flight instruction which tracks the language of section 1127c. (*Ibid*.) The " 'jury must know that it is entitled to infer consciousness of guilt from flight and that flight, alone, is not sufficient to establish guilt.' " (*People v. Mason* (1991) 52 Cal.3d 909, 943 (*Mason*).) A defendant's asserted lack of knowledge about the status of police investigations has no bearing on whether a flight instruction is proper. (*Id*. at pp. 941-942, & fn. 11.)[11]

Helton asserts that the flight instruction was improper because he fled from officers 12 hours after the crime, he was "miles from the scene of the crime" at the time, and the police had not yet accused him of the crime. We are not persuaded and conclude

[11] Helton argues that "a consciousness of guilt instruction" should not be permitted "when a defendant flees from—or avoids—police while wholly unaware that he is under suspicion of the charged offense." Current California law does not require that a defendant be aware that he is a suspect. (*Mason, supra,* 52 Cal.3d at pp. 941-942, fn. 11.) Moreover, as discussed below, there was evidence suggesting that at the time Helton fled from police he was aware that he was a suspect—indeed, he admitted committing the crimes before the police came looking for him.

that the trial court properly left to the jury the issue of whether CALCRIM No. 372 applied to the facts of this case. *Mason* is persuasive. There, in the context of holding that evidence of a high-speed chase that took place four weeks after the crime was admissible to prove consciousness of guilt, our Supreme Court explained that "[c]ommon sense . . . suggests that a guilty person does not lose the desire to avoid apprehension for offenses as grave as multiple murders after only a few weeks. Nor do our decisions create inflexible rules about the required proximity between crime and flight. Instead, the facts of each case determine whether it is reasonable to infer that flight shows consciousness of guilt." (*Mason, supra*, 52 Cal.3d at p. 941.)

There was sufficient evidence here from which the jury could reasonably infer that Helton's flight from the police tended to show his consciousness of guilt.[12] In particular, there was sufficient evidence for the jury to conclude that Helton's flight from police took place *immediately* after the crime. (§ 1127c; CALCRIM No. 372.) In contrast to the four-week-gap in *Mason*, a mere 12 hours had passed since the perpetrator broke into Evans's apartment in the early morning hours and attempted to strangle her to death. The fact that Helton was at his mother's home, a short distance from the crime scene,[13] at the time he fled from police further supports giving the instruction. (See *Mason*, *supra*, 52 Cal.3d at p. 941 [noting that the defendant's flight took place "only four weeks after, and in the same jurisdiction as" the alleged crime]; cf. *Lutz, supra*, 109 Cal.App.3d at p. 499 [flight does not require "the reaching of a far away haven in order to justify the instruction"].) Moreover, there was no evidence at trial providing an alternative explanation as to why, after police simply asked to speak with him, Helton ran away, pushing one of the officers aside and breaking into a full sprint as he did so. (See *People v. Southard* (2007) 152 Cal.App.4th 1079, 1091 [where defendant argued that he

[12] Arguably, the flight from police was Helton's second flight. The first was from Evans's apartment right after Evans's baby started to cry. However, neither party made this argument at trial, nor has either party raised this issue on appeal.

[13] There was evidence that Helton could ride his bicycle between his mother's house and Evans's apartment in about 20 minutes.

fled from police because he was driving with a suspended license, noting that " 'defendant did not introduce any evidence at trial that his license was in fact suspended, and in any event the jury was free to reject defendant's explanation' "].)

Even assuming it was error to give the flight instruction, we conclude that there was no reasonable probability that the instruction affected the jury's verdicts. (See *People v. Turner, supra,* 50 Cal.3d 668, 695.) Apart from Helton's flight from police, there was substantial evidence of Helton's consciousness of guilt prior to his arrest. After the crime, he called Bledsoe to tell her that he had done "something stupid" and was "on the run" He also checked in with Jones several times during the hours before his arrest to ask her whether she had found out anything else about the crime. And, most significantly, Helton admitted to friends before his arrest that he had broken into Evans's house, had almost killed her by strangling her, and would have killed her if her child had not awakened. If anything, the flight instruction helped the defense by emphasizing to the jury that the evidence of Helton's flight from the police was not sufficient in itself to establish his guilt. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1224 ["The cautionary nature of the [flight] instruction[] benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory"].)

IV. Ineffective Assistance of Counsel

Helton argues that defense counsel's statements indicating that Helton would testify in his own defense and describing the anticipated testimony of Helton's mother misled the jury in violation of his state and federal constitutional right to effective representation. We disagree.

a. Procedural Background

Although Helton did not testify at trial, defense counsel twice told the jury during his opening statement that Helton would testify. First, defense counsel stated: "Tiffany Duhon is a person Mr. Helton told later on in the morning, after Antonio [Sanders] had left, of what happened. [¶] Now, . . . Mr. Helton was relating the things that April [Jones] had told him early that morning. He was not saying he was the one that attacked Amber

[Evans]. He's saying this is what happened to Amber [Evans], and you will hear that probably from Mr. Helton"

Second, defense counsel stated: "At some point, [Sergeant Phillips] determined that Mr. Helton was a person of interest, that is somebody that he would need to talk to, because of this incident, and he had some reports from other people that said, 'Well, Mr. Helton said he's the man who did it.' [¶] So he went to Mr. Helton's house on Telegraph. They arrested Mr. Helton after a chase, a block or so. Mr. Helton is in the neighborhood where the cops come. You don't generally hang out at your house if you've committed a crime. You will leave. Mr. Helton will tell us a little bit more about that."

During his closing argument, defense counsel did not explain why Helton did not testify, but instead emphasized his right not to do so: "Along with the presumption of innocence, you remember one other important thing: a person accused of a crime has the absolute right to stand back, say, 'I refuse to testify,' and the judge has explained to us that that refusal cannot be held against an accused in the United States of America."

Defense counsel also told the jury that Helton's mother "will testify that on February the 21st, in the evening, Mr. Helton was home. He had been home for some time. When he went to bed, she went to bed. Mr. Helton was at home and went to bed. [¶] She was awakened in the morning, early morning on the 22nd, some time between 3:30, 3:40 in the morning, with a phone call. She took the call and woke Mr. Helton up. Mr. Helton returned that call, and April Jones will tell you that he returned that call at about 3:40. He returned that call from his home."

Helton's mother later testified that on the evening of February 21, 2005, Helton was asleep in the apartment from about midnight to the time that Jones called sometime before 5:00 a.m. She never heard Helton leave the apartment that night, and claimed that she would have heard him had he left because she was a light sleeper. When she went to tell her son about Jones's call a few minutes after receiving the call, she saw Helton in his underwear, "half [a]sleep," and coming out of the bathroom.

Analysis

To establish an ineffective assistance of counsel (IAC) claim, a defendant must prove that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a " 'reasonable probability' " that he would have obtained a more favorable result had his counsel acted competently. (*People v. Dennis* (1998) 17 Cal.4th 468, 540.) To establish the first prong of an IAC claim on direct appeal, the record must affirmatively disclose that counsel lacked a rational tactical basis for the challenged omission. (*People v. Majors* (1998) 18 Cal.4th 385, 403.)

Helton first argues that defense counsel's representations that his client would testify at trial "not only built up false expectations, but . . . effectively triggered the jury's natural inclination to view his client with suspicion when he subsequently failed to take the stand." In general, "[m]aking promises about the defense evidence in opening statement and then failing to deliver does not constitute ineffective assistance per se." (*People v. Burnett* (2003) 110 Cal.App.4th 868, 885.) Obviously, there could be any number of tactical reasons for defense counsel to change his mind during the course of a trial about having his client testify in his own defense. (*People v. Majors, supra,* 18 Cal.4th at p. 403; see also *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 [the decision whether to put on a witness is a matter "of trial tactics and strategy which a reviewing court generally may not second-guess"].)

Helton contends that "the question is not whether it was a sound tactical decision for counsel to ultimately dissuade [Helton] from taking the stand; rather, the question is whether counsel rendered ineffective assistance by expressly telling the jury that [Helton] would take the stand." But we also cannot tell from the record whether Helton himself simply refused to testify at some point after defense counsel's opening statement. (See *People v. Hines* (1997) 15 Cal.4th 997, 1032 ["Although tactical decisions at trial are generally counsel's responsibility, the decision whether to testify, a question of fundamental importance, is made by the defendant . . . ."].) If Helton decided not to testify mid-trial, all that his counsel could do is what counsel did here—emphasize to the

jury during closing that a criminal defendant "has the absolute right to stand back, [and] say, 'I refuse to testify.' " (See *People v. Mitcham, supra,* 1 Cal.4th at p. 1058 [" 'If the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," . . . the contention must be rejected' "].)

Regarding the prejudice prong, there is nothing in the record indicating that the jury may have viewed Helton with suspicion because he did not testify. First, defense counsel did not greatly emphasize Helton's anticipated testimony. He said that his client would "probably" testify about what he told Duhon, and that Helton would tell the jury "a little bit more" about his flight from police. And significantly, the prosecutor made no reference during closing argument to Helton's decision not to testify. Moreover, the trial court admonished the jury not to consider the fact that Helton did not testify, and defense counsel emphasized this instruction during his closing argument. (See *People v. Osband* (1996) 13 Cal.4th 622, 714, 717 [it is presumed that the jury followed the instructions].) We can discern no reasonable probability that the jury would have returned more favorable verdicts had counsel refrained from telling the jury that Helton would testify. (*People v. Dennis, supra,* 17 Cal.4th at p. 540.)

With respect to defense counsel's description of the mother's anticipated testimony, Helton argues that "by telling the jury that [the] mother would testify differently than she did regarding a material issue in the trial, defense counsel further damaged his client's credibility by misrepresenting the key testimony of his *sole* alibi witness." We conclude that there is no a reasonable probability that Helton would have obtained a more favorable result had his counsel been more precise in his description of the mother's anticipated testimony. (*People v. Dennis, supra,* 17 Cal.4th at p. 540.) There simply is no significant difference between defense counsel's description of the mother's testimony versus her actual trial testimony—both provided Helton with an alibi. As promised, the mother testified that her son was asleep at her home at the time of the crimes and was still at her home when Jones called shortly after the crimes. Helton asserts that the crucial difference was that defense counsel said that the mother would

testify that Helton was asleep when she went to tell him about Jones's call, while the mother actually testified that he was already awake and coming out of the bathroom at the time. The mother's actual testimony is that when she went to tell Helton about the call, she saw him in his underwear, and coming out of the bathroom while he was *half asleep*. Thus, her actual testimony served its promised purpose—it tended to show that Helton had apparently been asleep at his mother's home all night.

V. Cumulative Prejudicial Effect

Helton argues that the cumulative effect of the trial court's errors and of his counsel's ineffective assistance deprived him of his federal due process rights. Because we have not found any errors nor any ineffective assistance by defense counsel, we conclude that there was no cumulative prejudicial effect in this case. (See *People v. Hill* (1998) 17 Cal.4th 800, 844.)

VI. *Cunningham*

a. Procedural Background

The probation officer's report indicated that Helton suffered two prior convictions for second degree robbery. The report listed no mitigating factors, but listed six aggravating factors: (1) the crime involved great violence; (2) the victim was particularly vulnerable in that she was seven months pregnant and was in bed asleep along with her infant child when she was attacked; (3) the manner in which the crime was carried out indicated planning, sophistication, or professionalism; (4) Helton's prior convictions as an adult were of increasing seriousness; (5) Helton had served a prior prison term; and (6) Helton's prior performance on parole was unsatisfactory. (See Cal. Rules of Court, rule 4.421, subds. (a)(1), (3), (8), (b)(2), (3), (5).) The report recommended that Helton "be sentenced to the full extent of the law for the crimes for which he has been convicted."

At the sentencing hearing, the trial court indicated that it had read and considered the probation officer's report. The trial court imposed the upper term sentence on the attempted murder count, as follows: "I find appropriate the aggravated term of nine

years. I find that aggravating circumstances in this case outweigh any mitigating circumstances. I don't find any mitigating circumstances to exist, but I do find as aggravating circumstances the fact that the victim was particularly susceptible or vulnerable. This was every—probably every single woman's nightmare, or maybe every woman's nightmare, being awakened in her bedroom in the middle of the night, while she's lying in bed, by an intruder who physically assaults her. To make it even worse, her 14-month-old child was lying in bed next to her, and she was pregnant, very near her due date. All of these, in my mind, count as aggravating circumstances. The nine year upper term would be appropriate."

b. Analysis

The trial court selected the upper term on the attempted murder count before the United States Supreme Court's decision in *Cunningham* and before our Supreme Court's reaction to that decision in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*). Helton contends that the trial court's reliance on Evans's vulnerability in selecting the upper term violated his Sixth and Fourteenth Amendment rights to a jury trial as set forth in *Cunningham* and its progeny because this aggravating circumstance was neither admitted by Helton nor established by the jury's verdicts. We conclude that because Helton's recidivism provided a proper basis for imposing the upper term, there was no *Cunningham* error here. Moreover, even assuming it was error for the trial court not to *explicitly* rely on recidivism to impose the upper term, such error was harmless.

An upper term sentence based on at least one aggravating factor which complies with the requirements of *Cunningham* "renders a defendant *eligible* for the upper term sentence," so that "any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Black II*, 41 Cal.4th at p. 812.) Aggravating factors based on a defendant's undisputed recidivism, as set forth in the probation officer's report, do not run afoul of *Cunningham* and its progeny. (*Black II, supra,* at pp. 818-820.)

In selecting the upper term, the trial court here indicated that it had considered the probation officer's report , which listed three recidivist factors in aggravation: Helton's

prior convictions as an adult were of increasing seriousness; Helton had served a prior prison term; and Helton's prior performance on parole was unsatisfactory. (Cal. Rules of Court, rule 4.421, subd. (b)(2), (3), (5).) The probation officer's report indicated that these factors were based on Helton's two 1993 felony convictions for second degree robbery, for which he was committed to state prison for three years; on a 2002 misdemeanor violation of section 415, subdivision (1) (fighting in a public place); and on the fact that Helton had twice violated his parole. Helton did not, and does not, challenge the accuracy of this description of his criminal record. Consequently, the recidivist factors in aggravation listed in the report provided a proper basis for imposing the upper term here. (*Black II, supra,* 41 Cal.4th at pp. 818-820, fn. 7 [noting that the aggravating factor "that defendant's prior convictions were numerous or of increasing seriousness is supported by the probation report, whose recitation of defendant's criminal history was not challenged by defendant in the trial court"].)[14]

However, the trial court did not explicitly rely upon Helton's recidivism in imposing the upper term. Instead, the court focused on Evans's vulnerability as a victim. In *People v. Velasquez* (2007) 152 Cal.App.4th 1503, the court concluded that the upper term was justified where the probation officer's report indicated that there were two recidivist factors even though the trial court did not articulate on the record any reasons whatsoever for imposing the upper term. (*Id.* at pp. 1512, 1515-1516.) Under *Velasquez,* no *Cunningham* error occurred here. Helton's three recidivist factors were established by means satisfying the Sixth Amendment, and Helton was therefore eligible for the upper term and properly sentenced to that term. (*Velasquez, supra,* 1515-1516; *Black II, supra,* 41 Cal.4th at pp. 812, 816, 818-820.)

Helton relies on *People v. Cardenas* (2007) 155 Cal.App.4th 1468 (Cardenas) to argue that the trial court's failure to explicitly rely on his recidivism means that it cannot

[14] Indeed, with respect to his two prior felony convictions, Helton explicitly waived his right to a jury trial, and, in a bifurcated proceeding prior to sentencing, the trial court found that he had suffered those convictions.

now be used to justify imposition of the upper term. But *Cardenas* is distinguishable from the instant case in several significant ways. First, the Court of Appeal emphasized that the People, in urging imposition of the upper term, never even mentioned the defendant's prior criminal record as a reason for doing so. (*Id*. at p. 1479-1480.) Second, defendant Cardenas had a relatively insignificant criminal record: he had no prior felony convictions, and only a "few prior misdemeanor convictions." (*Id*. at p. 1480.) Finally, there was no indication in the record that the trial court ever considered the defendant's misdemeanor convictions before imposing the upper term. (*Ibid*.) Based on the foregoing, the court in *Cardenas* concluded that "unless *Black II* is interpreted to uphold upper term sentences based solely on improper factors merely because the defendant's record included a couple of prior misdemeanor convictions the prosecution did not even propose to the trial court as an aggravating factor, nor the trial court consider, this sentence must be reversed." (*Ibid*.)

In contrast, here both the probation officer and the People, in a letter to the probation department attached to the probation officer's report, urged imposition of the upper term based in part on Helton's recidivism, which included two serious prior felony convictions. (See *Cardenas, supra,* 155 Cal.App.4th at p. 1480 [distinguishing *Black II* by noting that there the defendant's prior criminal record in that case "included two felony convictions"].) Moreover, the trial court here had considered and was well aware of Helton's criminal record at the time of sentencing. First, it had already found in a bifurcated proceeding that Helton had suffered two prior convictions for second degree robbery. Second, the court said prior to sentencing that it had read and considered the probation officer's report, and also indicated that it had read the People's letter to the probation department. And third, the trial court and the parties discussed Helton's criminal record during the sentencing hearing in the context of Helton's *Romero* [15] motion.

[15] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Finally, even assuming there was *Cunningham* error here, we conclude that it was harmless. "[I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless." (*People v. Sandoval* (2007) 41 Cal.4th 825, 839.) We have no doubt that the jury would have found beyond a reasonable doubt that Evans was particularly vulnerable. (Cal. Rules of Court, rule 4.421, subd. (a)(3).) We recognize that the vulnerability of the victim is a "somewhat vague or subjective standard" about which a reviewing court will often have difficulty concluding "with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court." (*Sandoval, supra,* 41 Cal.4th at p. 840.) However, in this particular case, it was undisputed that at the time of the crimes Evans was more than seven months pregnant, was alone in her apartment except for her slumbering toddler son by her side, and was attacked in her bed. This was a situation where the victim was "obviously and indisputably vulnerable." (*Id*. at p. 842; **s**ee also *People v. Curry* (2007) 158 Cal.App.4th 766, 794 [concluding that the jury would have found beyond a reasonable doubt that the victim, who was seven months pregnant, was particularly vulnerable].)

DISPOSITION

The judgment is affirmed.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.